

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RONALD RAY MANNING**  
Claimant

VS.

**BOSLEY TIRE SERVICE**  
Respondent

AND

**AETNA CASUALTY & SURETY COMPANY**  
Insurance Carrier

AND

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 155,046

**ORDER**

Respondent and the Kansas Workers Compensation Fund requested review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated February 28, 1994. The Appeals Board decision of August 23, 1994 granted claimant a 20 percent functional impairment but denied him a work disability. This matter was timely appealed to the Court of Appeals of the State of Kansas. In its unpublished memorandum decision of August 11, 1995, the Court of Appeals reversed and remanded this matter back to the Workers Compensation Appeals Board with instructions for the Appeals Board to show in its opinion why it disregarded the testimony of Mr. Jerry Hardin in denying claimant work disability. This Order constitutes the Appeals Board's rationale for its earlier decision.

The applicable statute is K.S.A. 1990 Supp. 44-510e(a) which provides that if a claimant, following an injury, engages in any work for a wage comparable to a wage earned prior to the injury, there is a presumption of no work disability. The claimant has the burden of overcoming this presumption. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738, rev. denied 253 Kan. 859 (1993). The Court of Appeals, in its instructions to the Appeals Board, makes note that the Board made no mention of Mr. Hardin's testimony in its summary of the record or in the rationale for its decision. The Appeals Board, in considering this matter, adopted the record as specifically listed in the Award of the Special Administrative Law Judge. The deposition of Jerry Hardin dated April 29, 1993, was listed in the Award of Special Administrative Law Judge William F. Morrissey.

The statutory presumption of no work disability contained in K.S.A. 1990 Supp. 44-510e(a) has been discussed in a limited number of decisions by the Kansas Appellate Courts. In Lee v. Boeing Co., 21 Kan. App. 2d 365, 371, 899 P.2d 516 (1995), the Court stated:

"After examining the legislative history of the permanent partial disability provision, it is clear that the presumption of no work disability was designed to help prevent a worker from 'double dipping'--earning substantial post-injury wages while collecting work disability benefits."

In Lee the presumption was found to apply to a certain time period and then was rebutted as to a subsequent time period. In Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), the claimant could not avoid the presumption of no work disability by refusing an accommodated job at a comparable wage. In Elliff v. Derr Constr. Co., 19 Kan. App. 2d 509, 875 P.2d 983 (1993), the presumption was found to apply where claimant returned to a supervisory position with another employer for higher wages. In Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991), the presumption of no work disability was found to apply where claimant returned to work after an injury and worked 33 out of 57 days before he was fired for poor attendance.

In this instance, claimant was not returned to work at an accommodated position by the respondent because, when this was attempted, claimant failed a urinalysis test with respondent thus eliminating any possibility of his returning to work for respondent. It is significant to note that subsequent to claimant's loss of employment with respondent he worked several different jobs, all but one involving truck driving, and, at the time of the regular hearing, he was driving a dump truck in Arizona earning a greater wage than what he was earning at the time of the accidental injury. The Appeals Board found it significant that, while describing his work history, claimant discussed two jobs, construction and truck driving, as being his main occupations prior to his employment with Bosley Tire Service.

In reviewing the records from Mr. Jerry Hardin, it is noted that Mr. Hardin at no time described claimant as a truck driver prior to his work-related injury with Bosley Tire. It is further significant that Mr. Hardin had no information in his file, nor was any elicited in his deposition, as to claimant's activities subsequent to his date of injury. The fact that claimant had worked numerous jobs and, only nine days before Mr. Hardin's deposition was working as a dump truck driver in Arizona earning more than a comparable wage, is information neither within Mr. Hardin's file nor in his deposition.

Mr. Hardin is held out to be an expert at assessing an injured worker's loss of ability to perform work in the open labor market and to earn comparable wages after suffering a work-related injury. It would be difficult, if not impossible, for Mr. Hardin to accurately assess claimant's loss of ability to work in the open labor market without an accurate pre-and post-injury work history on claimant.

The Appeals Board acknowledges that uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The testimony of Mr. Hardin, while uncontradicted by another expert, cannot be deemed trustworthy when information necessary for Mr. Hardin to make an accurate analysis of the claimant's loss of access in the open labor market was denied Mr. Hardin both before and during his deposition. An expert's opinion is only as good as the foundation upon which it is laid. In this instance, the Appeals Board finds the foundation for Mr. Hardin's expert opinion regarding claimant's loss of access to the open labor market to be insufficient upon which an accurate opinion can be generated. While the Appeals Board did consider the testimony of Mr. Hardin, his opinions were deemed untrustworthy.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that its Award issued August 23, 1994, granting claimant a 20% permanent partial impairment of

function of the body as a whole, should be and is hereby affirmed and the orders contained therein are adopted by reference as if fully set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
Matthew L. Bretz, Hutchinson, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director